

contain the basis for this figure. However, it is clear that Selznick's budget did not include a number of required items. The largest single item omitted was the Commission hearing fee of \$6,760. Selznick knew that there would be another applicant and that such a fee would have to be paid in due course. Further, her budget failed to account for the small Commission fees for filing her license and STL applications, \$115 and \$85, respectively.

66. The instructions to the application form require that the applicant's budget include sales tax and freight. Selznick did not know whether these items were included in her cost estimate. She did not even know the sales tax rate in California, and the record is silent on this point. As it is her burden to prove her qualifications, the lack of record proof that sales tax and freight were included must be held against her, leading to the conclusion that these items were not considered. Selznick also neglected to budget for her cost of moving to California and subsisting for the first three months of station operation. Any funds she might expend in these areas would not be available for station use.

67. According to her application, Selznick had less than a \$1,000 cushion for unanticipated costs. A sales tax of 5% on \$79,460, the amount allocated for equipment under her revised budget, would add nearly \$4,000 to her cost estimate. This small increase alone would cause her costs to exceed the funds which she claimed were available. Given that her budget

shortfall was much greater than this \$4,000 amount, Selznick has not proven that her claimed funding of \$361,000 was adequate to meet all her expected costs. In the absence of such a showing, it must be determined that Selznick was not financially qualified when she filed her application.

68. In Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301), 4 FCC Rcd 3853 (1989), the Commission indicated its concern over the number of broadcast applications filed by entities that were financially unqualified at the time of filing. It therefore strengthened its financial certification requirements; these new requirements apply to Selznick's application. While "not requiring the applicant to submit underlying documentation to verify its cost estimate or funding sources", the Commission stated it is "now requiring that the applicant have such information and documentation on hand at the time it submits the application." (Emphasis in original.)

69. The Commission thus changed the standard. Previously, the applicant was not required to have the documents in its possession at the time of certification. However, effective with the 1989 revision, all documents had to be in the applicant's physical possession at time of certification. This was the meaning of the term "on hand".

70. The Commission stated that one benefit of the new policy would be to deter filing by financially unqualified applicants seeking a settlement. It stated, "If an applicant

must line up funding sources, identify them in detail and have underlying documentation in hand, it may be less likely to file an application merely to negotiate a settlement." (Emphasis supplied.) Hence, an applicant must have all underlying documentation in hand when it certifies its application.

71. Selznick had no writings from Dailey, either to memorialize his financing commitment, or to demonstrate his "net liquid assets" and net income after taxes for the prior two years when she filed her application. This fact alone compels a conclusion that Selznick was not financially qualified.

72. Even the oral communications between Selznick and Dailey did not provide reasonable assurance of the funds, as that term is defined by the Commission. At the time Dailey advised Selznick that he would give her the financing, he was not even aware of the amount of money involved. He had in mind the sum of \$350,000, an amount insufficient to meet even Selznick's identified costs of \$360,070.

73. Selznick and Dailey did not discuss any of the terms of the loan before she filed her application. No mention was made of the interest rate, repayment arrangements, collateral, or other conditions. Dailey had in mind specific terms for his loan to Selznick, including the interest rate, repayment provisions, and collateral. In addition, he wanted to monitor her station's performance quite closely. Dailey gave Selznick

advice concerning employees, urging her to make equity available to an experienced employee, before her application was filed. As the financier, Dailey would expect Selznick to take his advice. Should she form a corporation, Dailey desires a seat on its Board of Directors.

74. An essential part of an applicant having reasonable assurance of a loan is its knowledge of and acceptance of the terms of the loan. "It was incumbent on [the applicant] to firm up the terms and provisions of the purported bank loan." Peter Joseph Devlin and Patricia Eve Devlin, 7 FCC Rcd 2499 (Rev. Bd. 1992). The Instructions specify that by certifying her financial qualifications, Selznick "is also attesting that [she] can and will meet all contractual requirements, if any as to collateral, guarantees,..." Unaware of Dailey's conditions, Selznick was incapable of making an accurate attestation. Her certification, which perforce included this attestation, is demonstrably incorrect. The failure to discuss the specific terms of Dailey's loan negates reasonable assurance thereof. Imagists, 6 FCC Rcd 7440 (Rev. Bd. 1991).

75. In A.P. Walter, Jr., 6 FCC Rcd 875, 878 (Rev. Bd. 1991), the Board indicated that, while the absence of certain required terms from the loan commitment letter, standing alone, may not be fatal, it emphasized that "...it is axiomatic that there can be no reasonable assurance of the availability of financing where virtually none of the basic terms are present in a bank letter, including repayment terms, interest

rate and required collateral..." Here, there was neither a letter, nor a discussion of the terms.

76. The Commission may not accept Selznick's unfounded assertion that she and Dailey had an "understanding" of what his terms would be for the loan. While she may have had certain assumptions, they did not rise to the level of an understanding. An understanding must be based upon some outward communications. No such communications occurred here. Selznick does not assert that they possess extra-sensory perception ("esp"), or other novel means of communicating.

77. Selznick had no knowledge of Dailey's ability to make his loan in 1991, for Dailey did not disclose his liabilities. The Commission does not permit an applicant to rely upon another person for funding unless there was full disclosure of his liabilities. Sunshine Broadcasting, Inc., 101 FCC 2d 476 (Rev. Bd. 1985). Dailey's financial statement, Appendix A to Selznick Ex. 4, was not provided to Selznick until August 1993. As an applicant is prohibited from certifying its financial qualifications and later arranging financing, Aspen FM, Inc., 6 FCC Rcd 1602 (1991), Selznick may not rely on that document to show she was financially qualified in 1991.

78. Also, in addition to being without any writing giving Dailey's net income after federal income tax for 1990 or 1989, Selznick lacked any knowledge of this information when she filed her application. The instructions to Form 301

clearly require the applicant to have such information. Selznick failed to fulfill this requirement.

79. In sum, Selznick lacked reasonable assurance of the funds to construct and operate her station at the time her application was filed because:

- 1) There was no contemporaneous writing commemorating Dailey's promise to make a loan;
- 2) There was no discussion of the terms and conditions of Dailey's loan, making it impossible for Selznick to have agreed to them;
- 3) There was no discussion of the amount of Dailey's loan;
- 4) Selznick's cost estimate was significantly low, omitting FCC fees, freight, sales tax, and moving and living expenses. Even had Dailey agreed to make a loan of \$360,000, the number asserted by Selznick, it would have been insufficient to meet her costs.
- 5) Selznick had no documentation of Dailey's finances, or his net income for the past two years;
- 6) Oral discussion of Dailey's finances did not provide information on his liabilities. Selznick was therefore unable to determine that he had sufficient net liquid assets (as opposed to total liquid assets) to meet his

funding obligation.

80. Any one of these failures is sufficient to conclude that Selznick lacked reasonable assurance of financing when she filed her application. Given the large number of significant problems and omissions, there can be no doubt that Selznick was not qualified when she filed her application. Issue I must be resolved adversely to Selznick and her application denied.

B. Selznick's misrepresentations.

81. Having determined that Selznick was not financially qualified when she so certified in her initial application, the Commission must determine whether such certification is a misrepresentation rising to the level of disqualification. Selznick has the burden of proving that she made her certification in good faith. To meet this issue, Selznick must demonstrate by a preponderance of the evidence that her certification was reasonable. If her showing is not convincing, the issue must be decided adversely to her. "If ... the judge finds himself in doubt, he ... must decide the issue against the party having the burden of persuasion." McCor-mick on Evidence, 2nd Edition, West Publishing Company, 1972, at p. 784.

82. To demonstrate her good faith, Selznick relies on her reading of the Instructions, which she claims do not require a lender who is an individual to provide a written loan commitment. However, she did not rely exclusively on

these instructions, for she also consulted her communications counsel. Selznick asserts the attorney-client privilege for all communications with her counsel. While it may be Selznick's right to assert this privilege,⁶ in doing so she assumes the risk of failing to meet her burden of proof.

83. In McCormick on Evidence, supra, at page 656-657, the following principle was enunciated regarding the failure of a party to call a witness:

It is often stated that when a potential witness is available, and appears to have special information relevant to the case, so that his testimony would not merely be cumulative, and where his relationship with one of the parties is such that the witness would ordinarily be expected to favor him, then if such party does not produce his testimony, the inference arises that it would have been unfavorable. (Footnotes omitted.)

Accordingly, the Commission may conclude that counsel's advice was adverse to Selznick's interests.

84. Selznick is a practicing attorney and former radio station manager. It is reasonable to infer from this background that she is aware that rules and policies of the Commission are to be followed. Selznick asserts that she read and relied upon the instructions to the financial section of Form 301. If so, she was aware that the portion dealing with the financial qualifications section comprises nearly two single-spaced pages. It was of great importance to the

⁶ See, however, Welch Communications, Inc., 4 FCC Rcd 3979 (Rev. Bd. 1989), where the Review Board indicated that the privilege may not be invoked by an applicant facing a misrepresentation issue.

Commission. Selznick was clearly put on notice not to take the financial certification lightly.

85. Selznick failed to take many of the actions called for by the Form's Instructions. While she read the section which states that the applicant can and will meet all requirements for collateral, she neglected to even ask Dailey what security or collateral he might require for his loan. She was aware that the Instructions call for her to have Dailey's financial statement and net income information on documents, on hand at the time of certification, she had no such documents. She did not receive even an oral recitation of Dailey's income.

86. Selznick asserts that she interpreted "on hand" to mean available to her upon request, not in her possession at that time. She gives no basis for this strange interpretation. The record does not show that she confirmed her assumption with anyone. Selznick had communications counsel with whom she discussed the Commission's financial qualification guidelines. Either she ignored her attorney's advice, or she neglected to seek his counsel on this important matter. At a minimum, Selznick has not met her burden of proof that her interpretation of "on hand" was reasonable.

87. Selznick ignored the definition of the term "net liquid assets" as used by the Form's instructions. When she asked Dailey about his net liquid assets, neither of them understood what the Commission meant by that term, even though

it was defined in the instructions:

As used in Section III, 'net liquid assets' means the lesser amount of the net current assets or of the liquid assets shown on a party's balance sheet, with net current assets being the excess of current assets over current liabilities.

88. Selznick relied solely on Dailey's guess that it meant gross liquid assets. There is a significant difference between the two, for "net liquid assets" is the current assets less the current liabilities. Lacking information about Dailey's liabilities, and having read the instructions, Selznick knew she had insufficient information on his "net liquid assets" to allow her to make a proper financial certification.⁷ For these reasons, Selznick's reliance on the instructions to Form 301 do not demonstrate that her certification was made in good faith.

89. The record evidence, taken as a whole, belies Selznick's assertion that she read and relied on the instructions to Form 301 in responding to Section III of the Form. When the question of the need for documents was first raised, in Clanton's petition to enlarge issues, Selznick made no reference to the Form's instructions in her opposition. (TR 78) Her first reference to the instructions came later in the proceeding, after the issues were added.

90. Selznick testified that she was not sure she read the portion of the instructions which called for cost es-

⁷ This omission is sufficient, in and of itself, to make a financial certification improper. Sunshine Broadcasting, Inc., 101 FCC 2d 476 (Rev. Bd. 1985).

timates of equipment "in place and ready for service, including amounts for ... freight." She was unable to state whether her cost estimate included sales tax and freight.

91. Selznick either ignored, or did not read, the definition of "net liquid assets", as described above. Her interpretation of "on hand", as referring to documents, is quite strained at best. She ignored the Form's clearly stated requirement that she obtain a document giving Dailey's net income after taxes.

92. It is simply inconceivable that a practicing attorney would have read only part of the instructions, skipping both the requirement that freight and related costs be included, and the definition of "net liquid assets". There is no record basis for Selznick's misinterpretation of the easily understood phrase "on hand", as it refers to documents, and Selznick provides no justification whatsoever for her failure to obtain Dailey's after tax income.

93. Selznick failed to follow the Instructions in all these separate areas. It is unlikely that she would have been so remiss had she truly read the instructions before filing her application. The more probable scenario is that Selznick reviewed the Instructions after the issues were added and discovered that they do not specifically require an applicant to have documentation of the proposed loan when the lender is not a financial institution or manufacturer. She then concocted the contrived approach of having relied on the

Instructions in 1991, and has continued to testify in that manner throughout the proceeding.

94. The communications with her counsel, for which Selznick has asserted privilege, would likely shed light on when she first became aware of the Instructions approach to documentation. Selznick's failure to provide this evidence only strengthens the inference that her sworn testimony about relying on the Instructions before filing her application is false.

95. In Revision of Application, supra, the Commission stated that "any applicant who knowingly is not financially qualified but deliberately checks 'Yes' subjects itself to a potential misrepresentation as well as a financial issue at the hearing." The Presiding Judge noted initially that Selznick is not a naive applicant. She was fully aware of the meaning of her response to the financial certification question on the application. Her negotiations with the Cephas group had not succeeded and she knew she could not file her application without certifying to her financial qualifications. She was willing to falsely certify in order to get on file. Selznick not only misrepresented her financial qualifications to the Commission, but also testified falsely about reading the Instructions before filing the application.⁸ Issue II must be resolved adversely to Selznick.

⁸ Selznick's testimony about the appraiser visiting both apartments was also erroneous, for the appraisals themselves state that the appraiser did not inspect the units personally.

C. Selznick's current financial qualifications.

96. Before Selznick's current financial qualifications may be evaluated, her amendment of January 6, 1994, must be accepted. To date, no action has been taken on her petition for leave to amend and her entire showing on Issue III has not yet been admitted into evidence, for its receipt was conditioned on acceptance of her amendment. A condition for accepting her amendment is that she be found financially qualified at the initial filing. As Selznick has been shown to have been unqualified at that time, her amendment must be rejected. As a result, even were Selznick's claimed \$140,070 available to her, it would be insufficient to meet her estimated costs of \$360,070. On this basis, Issue III must be decided adversely to Selznick.

97. For completeness, Clanton presents additional conclusions of law on Issue III, demonstrating that Selznick has failed to demonstrate her financial qualifications, even were her amendment accepted.

98. To meet Issue III, Selznick must demonstrate that sufficient funds are available to her to meet the estimated construction and three months' operating costs. Selznick's revised budget gives her construction costs as \$79,460 and her three month cost of operation as \$30,000, making a total of \$109,460. However, the record shows that a number of items have been either omitted or underestimated. The actual cost is much higher than the Selznick's figure of \$109,460.

99. Selznick underpriced her antenna by \$2,000. She proposed a Jampro antenna in her application, and never sought to amend that item. She is not permitted to price a different antenna, for such is a variance from her application.

100. Selznick's cost must be increased to account for studio rent. Her assumption that she will have the first six months without payment of rent is unsupported. The letter from Miller & Associates does not state that rent need not be paid after the station begins operating. It merely says that in some cases there may be up to six months free rent while you are completing your installation... (Emphasis supplied.) Selznick has not identified any specific studio location. She has not spoken to any prospective landlord. There is no evidence that Selznick will not have to pay rent once her station begins operating. Moreover, the Miller & Associates letter states that rent may be waived during the installation period, in some cases. Selznick has not proven that her studio location will be one of those cases. The evidence is insufficient to find that any waiver of rent is appropriate.

101. Selznick has failed to make any allowance for her move from New York to California or for her living expenses from the time she arrives through the first three months of station operation. Certainly, she is to have a place to sleep and food to eat. She is liquidating all her cash and everything which may be turned into cash to pay for the station.

As she has not provided the cost of getting to California nor the cost to live until the station has been on the air for three months, she has not met her burden of proving that her budget figure is reliable.

102. Selznick's budget for employees is another area where she has underestimated her expenses. Miller & Associates, her advisor, estimated that a contract engineer would cost \$350 per month, or \$1,050 for the first three months. Selznick reduced the cost to \$125 per month, or \$375 for three months, after speaking to her counsel. The record provides no basis for accepting this lower figure. Selznick's total must be increased by \$575 to make up for this discrepancy.

103. More important, Selznick's current budget did not account for a news wire, which was estimated at \$1,625 for three months in 1991. Her salary estimate for a newsman/production person is only \$1,200, whereas Miller & Associates estimated a salary of \$1,500 per month for someone to handle the production and announcing, and not news duties. Selznick proposes two part time announcers, each working 25 hours per week. However, when she was asked to show that her staffing plan would provide for someone to be in control of the station 24-hours a day, she was unable to produce a reliable example. The record does not provide the necessary confidence that Selznick's allowances for staffing and news wire are accurate.

104. Other areas of deficiency include the absence of an

air conditioner, estimated at \$1,000 in 1991, and an allowance for the cost of promotion. Selznick's experience with trading for promotions at an existing station in a small town in New York State, is insufficient to prove that she would not have to spend money to promote a brand new station in El Rio, California.

105. The evidence permits quantification of some of the shortfalls in Selznick's revised budget, but not all. It must be concluded that Selznick has failed to meet her burden of presenting a valid estimate of the cost of constructing and operating her station for three months without revenue.

106. Selznick also has the burden of proving the availability of sufficient funds to meet her costs. Her showing does not come close to the total of \$140,070 which she asserts is available to construct and operate for three months the El Rio Station.

107. Selznick claims to have assurance of a \$40,000 loan from Dailey. The only evidence of Dailey's willingness to make this loan is found in his deposition, Selznick Ex. 4, Attachment B, P. 66. Therein, Dailey states that Selznick asked him if he would lend her \$40,000, and he responded, "Fine, you've got it." Again, no terms are mentioned. He does not identify the collateral which will be required. Also, the record is bereft of any information on Dailey's current financial standing or his ability to make a loan of \$40,000.

108. Except in rare cases, not relevant here, the Commission requires loan letters to specify the collateral and insists that the applicant demonstrate the ability to provide it. Scioto Broadcasters, 5 FCC Rcd 5158 (Rev. Bd. 1990), rev. denied, 6 FCC Rcd 1893 (1991), and A. P. Walter, Jr., 6 FCC 2d 875 (Rev. Bd. 1991). Information on the collateral to be required is vital here, for Selznick proposes to liquidate all of her investments and savings. She will retain nothing of value to offer Dailey to secure his loan.

109. For these reasons, there is no basis to conclude that Selznick has assurance of any funds from Dailey.

110. Selznick's liquidity analysis does not demonstrate the availability of \$100,070 from her own assets as asserted, but rather a much smaller amount.

111. Most of Selznick's funds are to come from the sale of her two cooperative apartments which are appraised at \$118,000 and \$86,000, or a total of \$204,000. It is Commission policy not to credit the full appraised value of real estate in determining liquid assets, but rather to discount it by 33 1/3%, in recognition of the fact that the net proceeds received by a seller of real estate are normally lower than fair market value. Port Huron Family Radio, Inc., 5 FCC Rcd 4562 (1990), at n. 5. Thus, Selznick's proceeds from the sale of her apartments must be reduced by 1/3 of \$204,000, or \$68,000, leaving only \$136,000 as the amount to be realized from the sale of the two apartments.

112. Certain of the other assets claimed by Selznick to be liquid are also unproven. She provides no information on her claimed \$8,000 inheritance. Her inheritance may not be credited as a liquid asset, for she makes no showing of when she will receive it. It is the applicant's burden to demonstrate that an asset is "liquid." Accounts receivable which have been aged are given only 75% credit. See, Port Huron, supra.

113. Selznick indicates approximately \$25,000 available to her from her retirement fund, after subtracting the 20% penalty and 32.5% for taxes. She testified that her taxable income in 1992 was about \$80,000, and that it should be somewhat more for the current year. As a single person, she would be in the 31% federal tax bracket, and would also be liable for 12.475% in New York State and City taxes.⁹ Accordingly, her deduction for taxes is insufficient by about 11.5% and she must subtract about \$5,000 from the amount stated as available from her retirement accounts.

114. Accordingly, Selznick may receive no credit for the \$40,000 loan from Dailey. She may receive credit only for \$40,000 in cash, \$20,000 from her retirement accounts, and \$136,000 for the value of her apartments. The total comes to

⁹ Proof of the New York State and City tax rates was provided in Clanton's Opposition to Selznick's Petition for Leave to Amend, filed January 17, 1994. Official notice of these rates is requested.

\$196,000. Selznick's liabilities must be subtracted from this figure to arrive at her net liquid assets. Her liabilities total \$176,300. Hence, Selznick is credited with less than \$20,000 from her own assets. The conclusion is beyond doubt; Selznick is woefully short of meeting even her reduced cost estimate, let alone the amount which will actually be needed. Ultimate conclusion.

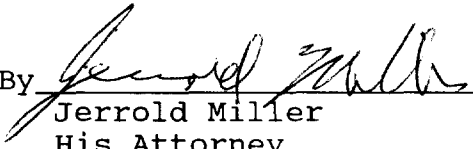
115. Selznick was not qualified when she first certified her finances. Her certification was a deliberate misrepresentation for it was made despite her knowledge that she did not comply with the Commission's standards. She continued to misrepresent to the Commission that she read and relied upon the instructions to the application form before filing her application. Selznick is not currently qualified for she has failed to present a reliable budget, has failed to prove the availability of a loan from Dailey, and has failed to demonstrate that her own assets will provide more than \$20,000 for application to station construction and operating costs. Selznick must be found unqualified to become a Commission licensee and her application must be denied.

116. With denial of Selznick's application, Clanton becomes the sole remaining applicant. As there is no bar to

the grant of his application, it may be granted at this time.

Respectfully submitted,

RAYMOND W. CLANTON

By 
Jerrold Miller
His Attorney

March 4, 1994

Miller & Miller, P.C.
P.O. Box 33003
Washington, DC 20033

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March 4, 1994

a copy of the foregoing document was placed in the United States mail,
first class postage prepaid, addressed to the following:

Paulette Laden, Esq.
Hearing Branch, Enforcement Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, NW, Suite 7212
Washington, DC 20554

Robert L. Thompson, Esq.
Pepper & Corazzini
1776 K Street, NW, Suite 200
Washington, DC 20006

Fayeann Beach